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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 666

CHARLES E. LESTER AND EDWARD ANTHONY BUCCIERI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 363 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1966. A petition for rehearing was denied on September 15, 1966. The petition for a writ of certiorari was filed on October 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' convictions for conspiracy to deprive a person of his civil rights should have been

set aside because the jury acquitted the State police officers involved in the alleged conspiracy.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> Conspiracy to commit offense or to defraud United States—
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 242 provides:

> Deprivation of rights under color of law—
>
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioners and one Carinci were indicted in the United States District Court for the Eastern District of Kentucky for conspiring, in violation of 18 U.S.C. 371, with three Newport, Kentucky police officers to violate 18 U.S.C. 242, and for aiding and abetting the officers to commit the substantive offense. After trial by jury, petitioners were convicted on the conspiracy count and acquitted on the substantive count. The police officers and Carinci were acquitted on all counts. On August 6, 1963, each of the petitioners was sentenced to imprisonment for 12 months (A. App. 9a–11a).[1] The court of appeals, one judge dissenting, affirmed (Pet. 59).

The count of the indictment upon which petitioners were convicted charged a conspiracy by which the police officers, while acting in their official capacities and under color of laws of the State, would wilfully deprive one George W. Ratterman of the rights, privileges and immunities secured to him and protected by the Fourteenth Amendment—namely, the right not to be deprived of liberty without due process of law, the right to be free from arrest by an officer acting arbitrarily and without legal justification, and the right to the equal protection of the law (see Pet. 57–58). The government's evidence showed the following.

Early in 1961 a Campbell County, Kentucky citizens' reform committee, concerned about vice and

[1] "A. App." refers to the appellants' appendix in the court below, "G. App." to the government's appendix.

corruption in the city of Newport, sought to fill the office of county sheriff with a well-known athlete and attorney, George W. Ratterman (G. App. 46b–54b; 36b–37b). At the time, the petitioner Buccieri was the manager of the gambling casino of the Glenn-Tropicana, a Newport night club and hotel; petitioner Lester was the club's attorney; and co-defendant Carinci was corporate president (A. App. 155a–158a; G. App. 108b). On April 5, the day of the announcement of Ratterman's candidacy, Carinci asked an acquaintance to arrange a meeting for him with Ratterman (G. App. 2b–7b). A few days later petitioner Lester telephoned a Newport photographer and directed him to meet with Buccieri to discuss a picture. When the photographer complied, Buccieri told him that "he wanted me to take a picture of a man and a woman in a room" and that the photographer was to "jump in and take the photograph and then jump out." Buccieri assured him, "Now, don't worry about anything we will protect you." (A. App. 40a.) The photographer left with Buccieri a telephone number where he could be reached at night (A. App. 34–44a).

On the evening of May 8, the scheduled meeting between Ratterman, Carinci and an acquaintance took place in a Cincinnati restaurant (G. App. 62b–65b). At about 1:30 a.m. Ratterman was ushered into suite 314 of the Glenn-Tropicana. Almost immediately Buccieri sent a club showgirl to the suite to have a drink (G. App. 43b). Ratterman, then feeling uncontrollably drowsy (and having no recollection of having entered the hotel), left the sitting room of the

suite and lay down in the adjoining bedroom (G. App. 66b–67b). At about this time the club's featured striptease artist, April Flowers, was directed to cut her performance short and report immediately to the suite in costume. There she was instructed, but was unable, to awaken Ratterman. She was left in the bedroom alone with him (G. App. 84b–94b).

Meanwhile, some ten minutes after Ratterman had been taken to Glenn-Tropicana, a male caller telephoned the photographer's home, told his wife that he had to have a picture taken "right away" (G. App. 17b), and asked her to have her husband call Buccieri at the club. The wife did not deliver the message and refused to answer the subsequent rings of the telephone (G. App. 17b–19b).

At 2:20 a.m., gambling operations near suite 314 were closed earlier than usual and patrons asked to leave (G. App. 89b–90b).

At 2:32 a.m. a male caller telephoned the Newport police station and asked to speak to one of the defendant officers (G. App. 24b–26b), who subsequently reported that an anonymous voice had said, "If you want to get George Ratterman, he is in Room 314 of the Glenn Hotel" (G. App. 42b). The three defendant officers rushed immediately to the club, where they arrested Carinci and April Flowers, and, after a brief scuffle, took Ratterman into custody wrapped in a bedspread (G. App. 95b–98b). Ratterman testified that the officers, who had reported finding him with his trousers off, actually had torn the trousers from him at this time (G. App. 68b).

At the police station petitioner Lester arrived, having contacted a bondsman who posted bail for April Flowers and Carinci but who refused to post bail for Ratterman (G. App. 31b–32b; 40b). At approximately 4 a.m. that morning petitioners, Carinci and the three defendant police officers were seen together at the Tropicana and later at another club (G. App. 105b–106b).

On the following day, a physical examination of Ratterman, arranged by his family doctor, revealed traces of from 3 to 4 grams of chloral hydrate ("knock-out drops") estimated to have been ingested between 10 and 11 o'clock the previous evening (G. App. 101b–105b).

A lawyer who represented the city of Newport in a subsequent criminal prosecution against Ratterman testified that petitioner Lester told him that April Flowers would testify that Ratterman made an approach to her. Lester gave the attorney a pen (bearing Ratterman's name and phone number) which Lester said Ratterman had given Miss Flowers. The prosecutor said that he moved to dismiss the case against Ratterman during trial, over the protest of Lester, after hearing the testimony of the photographer (see A. App. 90a, *et seq.*). April Flowers testified that Lester had produced the pen and that she, under instructions from Lester, had testified falsely at the local prosecution that Ratterman had given it to her (A. App. 112a–113a). She also testified that at the time she had seen Ratterman on the night in question, he had been fully clothed (G. App. 95b),

and that at the local trial she had lied about this and an alleged approach. She had been told by Buccieri and Carinci to go along with the police if she "wanted to stay healthy" (G. App. 101b; A. App. 114a).

ARGUMENT

Petitioners concede that private citizens may properly be indicted for conspiring with State officers to deprive an individual of his civil rights under color of law, in violation of 18 U.S.C. 242. See *United States* v. *Price*, 383 U.S. 787. They concede, too, that if the State officers themselves had done, or had agreed to do, what the jury found petitioners planned—institute a prosecution based on fabricated evidence which had been created for the specific purpose of bringing about the arrest and trial of Ratterman—their conduct would have violated Section 242. The only question is thus whether it is possible for private persons to commit an offense under 18 U.S.C. 242 by wilfully causing *innocent* police officers (that being the jury's verdict) to act under color of law to deprive an individual of his civil rights.[2] We believe so.

It has long been settled that, acting through an innocent instrumentality, one may commit an offense that he could not commit directly.[3] Accordingly, 18

[2] If the substantive offense can thus be committed by one or more private persons, then, clearly, an agreement to commit such offense is an unlawful conspiracy under 18 U.S.C. 371 whether or not the plan succeeds and the substantive offense occurs.

[3] See *United States* v. *Gooding*, 12 Wheat. 460; 1 Chitty, *Criminal Law* (5th ed., 1847), p. 256a; 1 Wharton, *Criminal Law and Procedure* (1957), § 106, pp. 230–231.

U.S.C. 2(b) provides that "[w]hoever wilfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States, is punishable as a principal." (Emphasis added.) The underscored language was included precisely "to * * * make certain the intent to punish [persons under Section 2] regardless of the fact that they may be incapable of committing the specific violation." S. Rep. No. 1020, 82d Cong., 1st Sess., p. 7. Thus, in *United States* v. *Inciso*, 292 F. 2d 374, certiorari denied, 368 U.S. 920, the Seventh Circuit affirmed the conviction of a defendant who was not himself charged with being a "representative" within the prohibition of Section 302(b) of the Labor Management Relations Act (29 U.S.C. 186(b)), but was charged, rather, with "causing" such a representative (a labor union not indicted, or charged with acting wilfully) to receive money from employers. And even before the enactment of 18 U.S.C. 2(b) in its present form federal courts had held that defendants could properly be charged as principals for causing innocent agents to submit false papers in violation of federal statutes that the defendants could not themselves have violated.[4]

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[4] See *Boushea* v. *United States*, 173 F. 2d 131 (C.A. 8); *United States* v. *Selph*, 82 F. Supp. 56 (S.D. Cal.); see, also, *Cohen* v. *United States*, 157 Fed. 2d 651 (C.A. 2) (persons not bankrupt could be guilty of a conspiracy that a bankrupt would conceal its assets, albeit the bankrupt was not and could not be indicted as a conspirator); cf. *United States* v. *Kaufmen*, 212 Fed. 2d 613 (C.A. 2). None of the many decisions cited by petitioners as being in conflict with the instant case (Pet. 9–10) is remotely in point.

These settled principles clearly apply to 18 U.S.C. 242. The section formerly punished one who under color of law "subjects, *or causes to be subjected*, any inhabitant" to the indignities prohibited by its provisions. See Section 20 of the Act of March 4, 1909, 35 Stat. 1092, derived from R.S. 5510 (emphasis added). In the 1948 codification of the criminal code the underscored language was eliminated (along with such phrases as "causes or procures" in other sections of the code) for the sole reason that it was deemed unnecessary in the light of the definition of principal in Section 2(b). (See Reviser's notes.) This history negates petitioners' argument that, because they could not act directly under color of law, they are not punishable under the statute; since any action by officials is of necessity direct action, a "causing" provision would be redundant except as applied to a private individual.

This Court's decisions of last Term dealing with the civil rights statutes do not support petitioners. In *United States* v. *Price*, 383 U.S. 787, the Court held only that private persons charged jointly with State officials with violation of Section 242 were indictable as principals acting under color of law. In *United States* v. *Guest*, 383 U.S. 745, unlike here, private persons *only* were charged with a conspiracy in violation of 18 U.S.C. 241 (a companion statute to 242), and the indictment contained no specific allegation that the private persons had acted under color of law. Yet, a majority of the Court found the indictment sufficient "at least to require the denial of a motion to dismiss," because one means of accomplishing the conspiracy was alleged to be "[b]y

causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." 383 U.S. at 756. To be sure, the separate opinion of Mr. Justice Brennan reads the majority opinion to imply that the prosecution would fail in the absence of proof of the active connivance of State officers, but we do not believe that the majority opinion can be so interpreted, in light of its unequivocal disclaimer of any view on the extent of the State action that must be shown, and its statement that such involvement need not be "exclusive or direct." 383 U.S. at 755.

We stress that here the State involvement was more than peripheral. The crime contemplated the direct use of State power as an essential means to the unlawful purpose, and specific intent to deny constitutional rights was proved. Thus, had petitioners succeeded in utilizing State power, they could have been held accountable as principals. Therefore, they could be guilty of *conspiring* to commit the offense—a charge not dependent on its successful consummation.[5]

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[5] There is no basis for the concern of the dissenting judge below that every arrest on probable though erroneous cause would amount to a federal offense. The element of specific intent required by this Court's decision in *Screws* v. *United States*, 325 U.S. 91, must be established in every case. The record of this case shows that the instructions in this regard were clearly sufficient. The court read the statute and the indictment to the jury (A. App. 237a, 251a), repeatedly instructed that the jury must find that the defendants agreed to violate Ratterman's civil rights by having him taken into custody without cause (A. App. 236a–237a, 239a), and cautioned that it could not convict unless it found that the offense was committed intentionally and wilfully (A. App. 235a–236a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966